1968

State Of Utah, By And Through Its Road Commission v. Lloyd Stanger And Edna Olson Stanger, His Wife : Appellant's Reply Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, by and through its ROAD COMMISSION,
Plaintiff and Respondent,

vs.

LLOYD STANGER and EDNA OLSON STANGER, his wife,
Defendants and Appellants.

Case No. 11028

APPELLANTS' REPLY BRIEF

Appeal from Judgment and Order
Second District Court, Weber County
Honorable John F. Wahlquist, Presiding

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ARGUMENT

THE CASES CITED IN RESPONDENT'S BRIEF SUPPORT APPELLANTS' CLAIM THAT THEIR PROPERTIES HAVE SUSTAINED COMPENSABLE SEVERANCE DAMAGES.

In its brief (pp. 2 & 3) the State Road Commission argues that the trial judge was clearly correct in his

comments and instructions to the jury concerning severance damages. Specifically, the respondent refers to Instruction No. 7 as requiring that severance damage, in order to be compensable, " . . . not be *entirely* due to the project's presence in the general area; . . . " (Ephasis added). In other words, the respondent argues that the jury was called upon to separate noncompensable damages from compensable damages. The respondent then equates noncompensable damages with the infringement of the rights of access, light, air, view, drainage and privacy.

The errors in respondent's argument will be pointed out *infra,* but first it must be made clear that Instruction No. 7 was more sweeping than the respondent represents. In fact, Instruction No. 7 required that severance damage, in order to be compensable, not be " . . . *in part,* or *entirely,* because of the projects (project's) presents (presence) in the general area independant (independent) of this taking . . . " (Emphasis added). In other words, the court effectively precluded the jury from even considering those damages which the State of Utah claimed to be noncompensable by requiring that no segment or part of the damage suffered by the appellants be shared in common with their neighbors. The trial judge would have saved time in obtaining the result he did by granting the respondent's Motion for Directed Verdict instead of reserving the ruling.

As previously indicated, the respondent argued in its brief that, in arriving at severance damages, a

distinction must be drawn between compensable and noncompensable damages. In defining the line of demarcation between the two, the respondent cites (p. 4) *State Road Commission v. Fourth District Court,* 94 Utah 384, 78 P. 2d 502 (1937), for the proposition that compensable damages are those which are *actionable.* The quotation furnished by respondent from the *Fourth District* case is abstract in form, posing the question, but not giving the answer. Ironically, the answer can be obtained from a careful study of the cases cited by respondent in its own brief.

Before making an analysis of the authorities cited by respondent, it would be well to place those cases in their proper perspective. In doing so the distinction recognized by Section 78-34-10, Utah Code Annotated, 1953, between damage to a parcel, part of which is taken, and damage to a parcel, though no part thereof is taken, must be given at least some significance. The significance of this distinction was pointed out in *Rose v. State,* 19 Cal. 2d 713, 123 P. 2d 505 (1942), a case which respondent cited in its brief and in which the court held that where the necessity for assessing damages to private property arose *apart from any taking of* property, the problem of limiting the landowner's recovery to items for which he is legally entitled to recover damages becomes more acute.

The cases cited by the respondent deal, for the most part, with factual situations where there was no actual taking of real property. Many of these cases are con-

cerned with damages which all courts have agreed are noncompensable; namely, diversion of traffic, creation of cul-de-sacs involving no taking, and the separation of traffic lanes by construction of medians.

The respondent argues that this distinction is not a viable one, particularly where only a sliver of land is taken. The respondent argues that " . . . (b)oth types of situations should be treated equally, . . . " (p. 4). However, respondent feels it more fair and equitable to recognize the damage, but to declare it non-compensable in an effort to establish equality than to compensate for all damage.

Looking now to those specific cases cited by the respondent, it can be seen that other courts, and in fact this very Court, have seen fit to compensate a landowner though no part of his property has suffered a physical taking. Furthermore, the question of, What constitutes *actionable* damage?, can be answered.

The case quoted most extensively by the respondent was the case of ***Rose v. State,*** 19 Cal. 2d 713, 123 P. 2d 505 (1942). It will be noted that the quotation (p. 6) is replete with reference to the noncompensability of damages caused by a *diversion of traffic.* The appellants have no quarrel with the quotation so long as it is limited to the facts of that case and is applied, as the California court intended, to the element of damage caused by a diversion of traffic.

The ***Rose*** case concerned an action by Rose and others to recover damages caused by the building of

an underpass in the street in front of their properties. Rose's land consisted of a total of 3.05 acres zoned industrial but devoted to a fruit orchard with residence, barn, tankhouse and windmill. The plaintiff's property was adjacent to the railroad tracks. The underpass was constructed in front of the plaintiff's property in a street which was originally 66 feet wide. The underpass was 16.5 feet deep and 24 feet wide. On each side of the underpass were 14.5 foot wide cul-de-sacs. There was absolutely no physical taking of land owned by plaintiff.

The court considered the case as presenting two major questions: (1) Whether Section 14 of Article I of the California constitution was self-executing, and (2) Whether the plaintiff suffered a compensable damage within the meaning of the constitution.

The court held that by the words, "Private property shall not be taken or damaged for public use without just compensation having first been made . . . ", an inverse condemnation case could be brought against the state. The constitutional provision was self-executing.

In affirming the trial judge's holding that the plaintiff was entitled to compensation, the court said on page 514:

> "That the owner of property fronting upon a street or highway has as appurtenant thereto certain private easements in the street in front of or adjacent to the lot—distinguished from

> the public easements therein—which are a part and portion of his property and are the private property of the lot owner as fully as the lot itself, is not open to question."

The court then quoted with approval another California case on page 514, as follows:

> "The property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of these rights he is entitled to compensation. This right is peculiar and individual to the abutting owner, differing from the right of passing to and fro upon the street, which he enjoys in common with the public, and any infringement thereof gives him a right of action."

The court specifically held that the doctrine of damnum absque injuria had no application where the person suffering the damage had a property right, i the right of access in that case. The trial judge was u held in finding that the plaintiff's easement of acces or right of ingress or egress was substantially impaired by the construction of the subway. Denials of damage on the basis that they occurred through an exercise of the police power was ruled out since police power involved "regulation" and no regulation was there present. Instead, the case was said to be the result of a public improvement constructed by the state in its exercise of the power of eminent domain. The case was contrasted with cul-de-sac cases on the basis that in those cases there was no impairment of access, as here.

The State Road Commission also cited (p. 8) the case of *State Highway Commission v. Silva,* 71 N. M. 350, 378 P. 2d 595 (1962), for the application of the doctrine of damnum absque injuria. The respondent's brief did not, however, make clear that—

> " . . . (t)he real cause of the depreciation in value of their property by reason of the highway improvement is the diversion of traffic from U.S. 85 to the new interstate highway." (378 P.2d 595, 596).

The *Silva* case is concerned with the diversion of traffic from the landowners' bar by the creation of a cul-de-sac. The second paragraph of the opinion says, on page 596:

> "It should be noted that none of defendants' property was appropriated, nor was there any change of grade on the road in front of their property."

Respondent represents in its brief (p. 3) that *Springville Banking Company v. Burton,* 10 Utah 2d 90, 349 P. 2d 157 (1960), is authority for the proposition that certain damages are noncompensable whether there is no taking or whether there is a "tiny taking". The *Springville Banking* case was concerned with a median to divide traffic lanes. There was no physical taking in that case nor is there reference to such.

The State Road Commission cites Annotation, 22 A.L.R. 145, 148 (1923), at which point the Annotation makes reference to the Georgia case of *Austin v.*

Augusta Terminal R. Co., 108 Ga. 671, 34 S.E. 852 (1899). The Annotation is entitled, "Right of abutting owner to compensation for railroad in street under constitutional provision against damaging property for public use without compensation." For clarity the Annotation is arranged in outline form. Under II (a) the Annotation refers generally to the divergency of court opinions, pointing out that there exists a strict construction and a liberal construction. Under II (b) the annotation cites those cases strictly construing the constructional provision, including the *Austin* case referred to in respondent's brief. Under II (c) the annotation cites those cases liberally construing these constitutional provisions, including the Utah case of *Stockdale v. Rio Grande Western R. Co.*, 28 Utah 201, 77 Pac. 849 (1904). Further on the Annotation discusses specific injuries which are either compensable or noncompensable. Under III (d) (2), regarding interference with access by changing grade, the Annotation says on page 171:

> "The cases uniformly hold that if the grade of a street is changed by a cut, or embankment, or a viaduct, so as to interfere with the abutting owner's ingress and egress, he is entitled to damages."

The respondent's brief does cite the *Stockdale* case (p. 7) but only to quote the court's limitation to the doctrine which it had previously announced and which had controlled the case. In restraining the defendant from operating cars over a railway track adjacent to

the plaintiff's premises, this Court quoted 1 Lewis on Eminent Domain (2 d Ed) Sec. 57, to this effect:

> " . . . And the great weight of the more recent judicial authority, which we believe to be supported by the better reason, and which is more in accord with our ideas of equity and natural justice, holds that any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is, in fact and in law, a taking, in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed."

The *Stockdale* case is consistent with the case of *Dooly Block v. Salt Lake Rapid Transit Company,* 9 Utah 31, 33 Pac. 229 (1893), which was cited by respondent (p. 13) and by appellants (p. 32) in their original brief. In that case the railroad company was prohibited from constructing a third set of tracks in the street in front of the plaintiffs' homes. This court, in the words of respondent, " . . . recognized that the abutting property owner could recover for an *established* right of easement . . . " In that case the *established* right of easement was had by the abutting property owner over the street which was held in fee by *Salt Lake City. In the case at bar the established right of "easement" is over the street which is actually owned in fee by the appellants!* As shown by its Complaint (R. 1) the respondent is acquiring fee title to 0.89 acre of land,

0.66 acre of which is within the north half of Seventh Street.

Coming back to the case of *State Road Commission v. Fourth District Court,* 94 Utah 384, 78 P. 2d 502 (1937), a quotation therefrom is found on page 16 of respondent's brief. The respondent quotes that—

> "In some jurisdictions . . . there must be a taking of property . . . "

What the respondent doesn't report is that this Court specifically held in the *Fourth District* case on page 508 that reference to damaged property in the Utah constitution was intended to put an end to controversy " . . . and to protect the damaged property owner equally with the property owner whose land was physically entered upon."

On page 3 of Respondent's Brief the following interesting statement appears:

> " . . . It is the jury's duty to separate non-compensable damages from compensable damages and allow only the constitutional 'just compensation' to the condemnee."

Appellants take issue with the foregoing statement and affirmatively counter with the claim that it is not the jury's duty to separate compensable from non-compensable damages; rather, it is the province of the Court during the course of trial to exclude evidence of damages relating to noncompensable items. To illustrate how this works in actual practice, the case of *Utah Road Commission v. Hansen,* 14 U. 2d 305, 383

P. 2d 917 (1963), which was apparently cited by respondent in support of the foregoing quotation, illustrates the practical workings relative to the problem.

In the *Hansen* case the property owner attempted to introduce evidence in support of damages relating to the cost of removing several hundred wrecked automobiles from his premises, business losses due to a premature sale of approximately 180 of such automobiles, and a separate item of damages resulting from a loss of access to a portion of his properties. As to these separate claimed items of damage the trial court *excluded evidence* of such items since, under the circumstances of the case and the applicable law, the items were noncompensable or included within the general measure of damages. As for the cost of removing the automobiles and the business losses, such items were not compensable because they were outside the rule of recovery in eminent domain cases; accordingly, the Court properly excluded them. The Court further excluded evidence relative to a special amount to be designated for "loss of access" since that figure was an element which went into the general amount of damages to be awarded. In fact, the Court properly pointed out that the measure of damages to the real properties involved which were not taken was the " . . . difference in the value of the remaining tract before and after the taking."

Appellants submit that the province of the Court is to rule as to whether specific claimed items of damage are compensable or noncompensable, and that it is the

province of the jury to weigh the offered and admitted evidence in arriving at its decision. In no case which has ever come to the attention of this writer has an attempt been made, such as here, to suggest that it is the province of the jury to make a legal determination of what items of damage are compensable as distinguished from those which are noncompensable. The jury tries facts—not law.

CONCLUSION

From the foregoing argument it should be clear that the delineation of *actionable* damages to private property—*though no part thereof is taken* (U. C. A. Sec. 78-34-10 (3)), is more acute than the delineation of actionable damages to remaining private property—*a part of which is taken* (U. C. A. Sec. 78-34-10 (2)). It should also be abundantly clear that an infringement of the rights of access, light, air, view, drainage and privacy are compensable under the respondent's demarcation at the point of *actionable* damages. If any more clarity is desired the same can be obtained from Justice Wade's concurring opinion in *Weber Basin Water Conservancy District v. Gailey,* 5 Utah 2d 385, 303 P. 2d 271, 274 (1963):

> "On the question of what constitutes a taking or damaging of private property for public use we have held that a change in the grade of an adjoining highway and the building of a viaduct in the adjoining street inflicted compensable

damages to the property of the adjoining landowner. Clearly, if such cases caused *actionable* damage to the adjoining property . . . (then actionable damage is here present)". (Emphasis added).

Respectfully submitted,

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